Filed 3/15/17 P. v. Cathey CA5



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FIFTH APPELLATE DISTRICT**

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JOHNNY ERVIN CATHEY,<br><br>Defendant and Appellant. | F072080<br><br>(Super. Ct. No. VCF237026)<br><br>**OPINION** |

**THE COURT**[*]

APPEAL from a judgment of the Superior Court of Tulare County. Kathryn T. Montejano, Judge.

Michele A. Douglass, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Lewis A. Martinez and Ian Whitney, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Detjen, J. and Peña, J.

## INTRODUCTION

After the trial court denied his motion to quash, Johnny Ervin Cathey (defendant) pled no contest to possession of methamphetamine for sale, possession of a controlled substance with a firearm, possession of a controlled substance, maintaining a place for selling methamphetamine, three counts of felon in possession of a firearm, possession of ammunition, and cruelty to a child by endangering its health. He also admitted enhancements pursuant to Penal Code[1] section 12022, subdivisions (a)(1) and (c). Defendant appealed and appellate counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436. We affirm.

## FACTUAL AND PROCEDURAL SUMMARY

A search warrant was issued on May 18, 2010, authorizing a search of defendant's person, residence, and travel trailer. Stephanie Franco, a probation officer assigned to the Inter-Agency Narcotic Enforcement Team (INET), signed the affidavit in support of the search warrant. The affidavit stated that within the last 10 days, a reliable confidential informant told Franco that a White male at a specific address was in possession of methamphetamine and weapons. The confidential informant identified defendant from photographs as the White male. Franco arranged for a controlled purchase of methamphetamine from defendant. The confidential informant made the purchase while under observation of INET officers.

A complaint charging defendant with multiple offenses was filed on May 21, 2010. The complaint alleged: count 1, possession of methamphetamine for sale, in violation of Health and Safety Code section 11378; counts 2 and 3, possession of a controlled substance (methamphetamine) with a firearm, in violation of Health and Safety Code section 11370.1, subdivision (a); count 4, possession of a controlled substance (prescription drugs), in violation of Health and Safety Code section 11350,

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**1** References to code sections are to the Penal Code unless otherwise specified.

subdivision (a); count 5, maintaining a place for selling methamphetamine in violation of Health and Safety Code section 11366; counts 6, 7, and 8, felon with a firearm, in violation of former section 12021, subdivision (a)(1); count 9, possession of ammunition in violation of section 12316, subdivision (b)(1); and count 10, cruelty to a child by endangering its health, a violation of section 273a, subdivision (b). It also was alleged as to count 1 that defendant was personally armed with a firearm, in violation of section 12022, subdivision (c); and as to counts 4 and 5, that a principal was armed within the meaning of section 12022, subdivision (a)(1). Defendant pled not guilty and denied all allegations.

On August 16, 2010, defense counsel filed a motion to compel discovery. The motion was granted.

Defendant moved for substitution of counsel on January 14, 2011. The trial court approved the substitution on January 21, 2011.

At the February 28, 2011, preliminary hearing, Franco testified. Franco testified the search warrant was executed May 19, 2010, and among the items recovered were a .45-caliber pistol, a pseudoephedrine prescription in a bottle bearing someone else's name, a .38-caliber revolver, various calibers of ammunition, Vicodin, a .22 long rifle, glass pipes, and baggies containing a crystalline substance that tested positive as methamphetamine.

The information was filed March 7, 2011. On June 29, 2011, defendant's attorney of record moved to withdraw. The trial court granted the motion on July 13, 2011, and appointed the public defender as attorney of record. On August 8, 2011, the public defender moved to continue the trial.

On September 16, 2011, defendant moved to quash the warrant and for disclosure of the identity of the confidential informant. The People filed written opposition to the motion to quash. A hearing on the motion was held on January 18, 2012. After argument from defense counsel and the People, the motion was denied.

On October 23, 2013, defendant entered a plea of no contest to the charged offenses and admitted three enhancements. The indicated sentence was four years and four months in state prison. Defendant failed to appear at the January 10, 2014, sentencing hearing. A bench warrant issued.

On December 31, 2014, defendant was before the trial court on the failure to appear at sentencing. Defendant was remanded into custody pending sentencing.

A sentencing hearing was scheduled for February 18, 2015. Sentencing was continued to allow defendant to file a motion pursuant to section 1170.18.

At the May 27, 2015, sentencing the trial court reduced count 4 to a misdemeanor pursuant to section 1170.18. The trial court imposed a term of 16 months for count 1, plus three years for the firearm enhancement appended thereto; on counts 2 and 3, a term of two years each to run concurrently to count 1; on counts 5, 6, 7, 8, and 9, a term of 16 months each to run concurrent to count 1; on count 10, a concurrent term of 180 days; and no time was imposed for count 4. Various fines and fees were imposed. The abstract of judgment was filed June 3, 2015.

Defendant filed a timely notice of appeal on July 21, 2015. Appellate counsel was appointed September 28, 2015.

On January 6, 2016, appellate counsel notified the superior court that the abstract of judgment in the appellate record was incomplete. The accurate and complete abstract was thereafter included in the appellate record.

## DISCUSSION

Appellate counsel filed a brief pursuant to *People v. Wende, supra*, 25 Cal.3d 436 on June 2, 2016. That same day, this court issued its letter to defendant inviting him to submit supplemental briefing. Defendant filed a supplemental brief on June 17, 2016.

In his supplemental brief, defendant contends that because Franco was a probation officer, Franco did not have the authority to "apply for this warrant" because a probation officer is not a peace officer. Defendant also contends that his felon in possession of a

firearm offenses should be reversed because his prior felony was for an offense that is now a misdemeanor under Proposition 47.[2]

As for the claim that Franco did not have authority to apply for the warrant because a probation officer is not a peace officer, defendant is incorrect. Probation officers are peace officers pursuant to section 830.5, subdivision (a). As part of her duties as a probation officer, Franco was part of an inter-agency team assigned to drug enforcement operations, the INET, at the time she submitted the affidavit for the warrant. Probation officers are peace officers as to "violations of any penal provisions of law which are discovered while performing the usual or authorized duties of his or her employment." (§ 830.5, subd. (a)(4).) Thus, Franco was a peace officer and acting within the scope of her authority in seeking the warrant. (See *People v. Rios* (2011) 193 Cal.App.4th 584, 600.)

Regarding his felon in possession of a firearm convictions, defendant's prior felonies were for violations of Health and Safety Code section 11377, subdivision (a), possession of methamphetamine. On November 4, 2014, voters approved Proposition 47, the Safe Neighborhoods and Schools Act (Proposition 47 or the Act). The Act went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).) When defendant committed his prior offenses, possession of a controlled substance was a "wobbler," meaning it could be punished as either a misdemeanor or a felony. (Health & Saf. Code, § 11377, former subd. (a); see § 17, subd. (a).) As a result of Proposition 47, the offense is now punishable as a misdemeanor, unless the perpetrator has one or more prior convictions for "super strike" offenses (see § 667, subd. (e)(2)(C)(iv)) or an offense requiring mandatory

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[2] Our Supreme Court has granted review to resolve the issue. (*People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted Mar. 30, 2016, S232900; *People v. Carrea* (2016) 244 Cal.App.4th 966, review granted Apr. 27, 2016, S233011; *People v. Ruff* (2016) 244 Cal.App.4th 935, review granted May 11, 2016, S233201; *People v. Williams* (2016) 245 Cal.App.4th 458, review granted May 11, 2016, S233539.)

sex offender registration pursuant to section 290, subdivision (c). If the person has already completed serving the sentence for the prior offense, he or she may seek to reclassify the prior felony conviction as a misdemeanor. (§ 1170.18, subd. (f).)

The first flaw in defendant's argument is that the remedy he seeks is outside the scope of section 1170.18, subdivision (f), which instructs eligible persons how to apply for reclassification of their prior felony convictions as misdemeanors under Proposition 47. As this court explained in *People v. Bradshaw* (2016) 246 Cal.App.4th 1251, 1257-1258, persons seeking to avail themselves of the benefits of Proposition 47 must first file a petition in the superior court. The record discloses no petition to reclassify defendant's prior felony convictions as misdemeanors.

The second flaw in defendant's argument is that he presumes Proposition 47 operates retroactively to alter a sentence enhanced by a prior prison term. It does not apply retroactively. In *People v. Park* (2013) 56 Cal.4th 782, the California Supreme Court stated, "There is no dispute that . . . defendant would be subject to the section 667[, subdivision ](a) enhancement had he committed and been convicted of the present crimes *before* the court reduced the earlier offense to a misdemeanor." (*Id.* at p. 802, italics added.) Defendant committed and was convicted of the current offenses while the prior convictions were classified as felonies. Defendant committed, and pled no contest to, the current offenses prior to enactment of Proposition 47.

Section 1170.18, subdivision (k), does not compel a contrary conclusion. This subdivision provides the following, in pertinent part: "Any felony conviction that is . . . designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes . . . ." The phrase "for all purposes" is identical to language in section 17, subdivision (b).

Under section 17, subdivision (b), when the court exercises its discretion to sentence a wobbler as a misdemeanor, "it is a misdemeanor for all purposes." However, the "misdemean[or] status [is] not . . . given retroactive effect." (*People v. Moomey*

(2011) 194 Cal.App.4th 850, 857.) So, while an offense may be a misdemeanor "for all purposes," it is not a misdemeanor "for all times." The trial court's declaration that a wobbler is a misdemeanor simply makes the offense a misdemeanor from that point on.

We presume the voters " 'intended the same construction' for the language in section 1170.18, subdivision (k), 'unless a contrary intent clearly appears.' " (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1100.) However, nothing in the language of section 1170.18 or the ballot materials reflects a contrary intent. (*Rivera*, *supra*, at p. 1100.) Indeed, the Act does not address the striking of past sentence enhancements at all. Accordingly, section 1170.18, subdivision (k)'s language, "for all purposes," applies, at most, prospectively to preclude future or nonfinal sentence enhancements based on felony convictions redesignated as misdemeanors under the Act.

After an independent review of the record, we find that no reasonably arguable factual or legal issues exist.

## DISPOSITION

The judgment is affirmed.